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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT C. MITCHELL, Petitioner,

v.

UNITED STATES, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT C. MITCHELL
#1 Pine Point Dr. #404
Bastrop, Texas 78602
(512) 332-0588
Pro Se

130 pp

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QUESTIONS PRESENTED

I. Is the income tax a direct or indirect tax, or does it lie somewhere outside the two great classes of taxes authorized by the Constitution?

II. Does a court of appeals violate the right to due process by rejecting, without consideration or explanation, the appellant's asserted arguments and authorities, solely under the "presumption of agency regularity"?

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The petitioner Robert C. Mitchell respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on July 21, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in the appendix hereto, p. 3A, infra.

The opinion of the United States District Court for the Western District of Texas, Austin Division is reprinted in the appendix hereto, p. 31A, infra.

JURISDICTION

The judgment sought to be reviewed was entered on July 21, 1994, by the Fifth Circuit Court of Appeals. See Appendix, p. 2A, infra.

Petitioner's Petition for Rehearing was denied by the Fifth Circuit Court of Appeals on July 21, 1994. See Appendix, p. 1A, infra.

This Court has jurisdiction to review the judgment in question under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below

Petitioner was charged in a four count information filed July 19, 1989, with the misdemeanor offense of willful failure to file income tax returns for the calendar years 1983 through 1986, in violation of 26 U.S.C. 7203. Jurisdiction was not claimed by the Government. Petitioner filed Motion to Dismiss for lack of statutory jurisdiction, which was denied. A bench trial was held before Magistrate Stephen H. Capelle on February 11, 1991. On December 12, 1991, the Magistrate found Petitioner guilty on all four counts. On March 24, 1992, the court entered its Findings of Fact pursuant to Rule 23(c) of the F.R.Cr.P. On March 25, 1992, the court sentenced Petitioner to three consecutive one-year terms of

imprisonment followed by a consecutive five-year term of probation. Petitioner was also fined $5,000 and ordered to pay $100 ($25 for each count).

The conviction was affirmed by the District Court. A timely appeal was made to the Fifth Circuit Court of Appeals. On June 6, 1994, Petitioner filed a Motion to Vacate for Lack of Subject Matter Jurisdiction (no independent decision maker), which was denied by the Fifth Circuit on July 21, 1994. On the same date, the Court entered its opinion on Petitioner's appeal, which rejected his claim of insufficient evidence. The case was remanded for retrial because of Petitioner's involuntary jury waiver. Judgment was entered on July 21, 1994. The Fifth Circuit denied a Petition for Rehearing on August 17, 1994.

Statement of Relevant Facts

By studying landmark Supreme Court decisions and the Congressional Record, Petitioner learned that the income tax is not a direct tax, but an indirect tax in the nature of an excise, and that "income" is not the subject of the tax. His research revealed that the subject of the tax is taxable activities and privileges. Petitioner had not engaged in any such activities or accepted any such privileges.

Petitioner relied on Supreme Court decisions establishing that the 16th Amendment authorized no new taxing power and that all taxes (including an income tax) must fall into one of the two classes of taxes (direct or indirect) authorized by the Constitution.

No facts were stated in the information filed against Petitioner that alleged his involvement in any taxable

activities, events or privileges and that would therefore make him a person subject to any internal revenue tax imposed by the Internal Revenue Code (IRC). The information cited no authority that made Petitioner liable for a tax, and stated no facts that associated him with such authority. Petitioner filed several pretrial motions in an attempt to discover any such activities, privileges or authority. These motions were all denied.

The information charged that Petitioner was "required by law" to make income tax returns and then failed to state the "law". Only the penalty section (7203) was cited, and it did not contain a requirement for anyone to do anything. In a response to one of Petitioner's motions, the Government addressed this omission by saying that the information "tracked section 7203".

No claim was made that the information stated or tracked any authority that required the making of a tax return or the performance of any act.

Petitioner's beliefs were verified by documented legal opinion letters, including one he received in 1981 that said he would be waiving his Constitutional rights if he filed a return, but would risk a wrongful prosecution if he did not. It was this opinion that prompted him to continue filing returns even though he sincerely believed he was not lawfully required to do so.

Based on the nature of the income tax, Petitioner filed his Motion to Dismiss for Failure to Charge an Offense. This pretrial Motion was not considered by the court and was summarily denied at sentencing more than a year after trial,

along with five other pretrial motions without the court having any knowledge of their contents. See transcript of sentencing hearing.

Prior to trial, the court submitted its proposed jury instructions with exactly the same instruction regarding willfulness that the Fifth Circuit had recently ruled was plain error. The trial court did not correct its instruction, notwithstanding Petitioner's written objection and correction.

Petitioner was forced to trial over his objection that the court lacked subject matter jurisdiction (failure to charge an offense). Petitioner waived a jury and a bench trial ensued.

At trial, the Government entered Petitioner's coded Individual Master File (IMF), reflecting his complete tax history, in an attempt to show that the Internal Revenue Service (IRS) allegedly

did not receive his returns. Documentary evidence, admitted by the court, along with cross examination testimony of Government witnesses and the testimony of Petitioner's expert witness, conclusively established that the IMF made no showing that Petitioner failed to file. Moreover, it was established that Petitioner's IMF contained codes showing that the IRS did, in fact, receive his original returns.

Petitioner entered copies of his filed returns and testified that he did timely file said returns.

Petitioner testified that he relied exclusively on the law, had no disagreement whatsoever with the law, and interpreted the law to mean what it said. Petitioner's correspondence with the IRS and Justice Department was admitted into evidence, supporting his acceptance and

reliance on the law, especially the IRC. The Government entered evidence showing Petitioner's disagreement with the IRS over the proper interpretation of the IRC. No evidence whatsoever was entered showing that Petitioner disagreed, in any way, with the law or that he deliberately violated a known law.

Almost a year after trial, without benefit of a trial transcript, which was requested by Petitioner on the last day of trial, the court returned a guilty verdict on all four counts.

The Government then submitted its proposed Findings of Fact, which were adapted **verbatim** by the court, including numerous clear errors, unquestionably prejudicial to Petitioner, which could have been avoided had the court made a simple check of the records admitted into evidence. The joint Findings of Fact, upon which Petitioner's conviction was

based, made no attempt to consider or evaluate the many rebuttal arguments filed with his post trial briefs, nor did the findings consider any cross examination testimony of Government witnesses. Further, the findings made no analysis of Petitioner's IMF, which was the exclusive source of the Government's documentary evidence used to allegedly show failure to file.

The findings contained a multitude of clear errors, including fabricated "evidence" which the fact finder pulled out of thin air. This fake "evidence", which was not even proffered by *false* Government testimony at trial, established a fictitious *confession* by Petitioner and was "significant" in the trial court's final determination of guilt. Additionally, Petitioner's correspondence was badly misquoted and

used to impeach his testimony.

All errors and unsupported "findings" of the trial court were unequivocally exposed and submitted in Petitioner's appeal briefs to the District Court and the Fifth Circuit Court of Appeals. Neither reviewing court, in its opinion, addressed Petitioner's many compelling points and authorities. Thus, the District Court affirmed the conviction, and the Fifth Circuit affirmed sufficiency of the evidence (thereby denying acquittal), with no consideration for Petitioner's numerous arguments or the admitted evidence. /1

Moreover, in affirming the lower courts' finding that Petitioner failed to file returns, the Fifth Circuit's opinion conflicts with one of its own recent decisions. U.S. v. Buford, infra. This was pointed out in Petitioner's appeal

brief and ignored by the Fifth Circuit.

The trial court found that Petitioner had a profound disagreement with the IRS, and the court improperly equated that to a disagreement with the law and a finding of willfulness. In affirming the lower court's faulty finding, the Fifth Circuit's opinion substituted "IRC" for "IRS" (see p. 16A, infra), thereby arbitrarily changing a disagreement with the IRS into a disagreement with the law. Thus, clear error by the fact finder, in conflict with this Court's holding in Cheek v.

/1 Petitioner is assuming that when an appeal rebuttal argument is not addressed, mentioned or discussed in any way by the reviewing court, the matter was not considered. In any case, Petitioner's factual foundation for this Court's review seeks to establish, at this point, that clear errors were made, rebuttable arguments were submitted in appeal briefs, and the reviewing court did not address Petitioner's arguments in its opinion.

United States, 111 S.Ct. 604 (1991), was changed into something that indeed "does not negate willfulness." Notwithstanding the Fifth Circuit's unconscionable changing of the trial court's Findings of Fact to create the appearance of willfulness, the criteria used by the lower courts to establish willfulness in this case are in conflict with Cheek, supra. In this instance, the Fifth Circuit upheld the conflict by changing the wording of the trial court's finding.

In its disregard for compelling defense arguments, the Fifth Circuit has, for perhaps the first time, exposed a reason for such neglect. The Court briefly, but correctly, stated Petitioner's argument that his IMF does not show failure to file returns. Then the Court dismissed the argument by stating, "Given the presumption of agency regularity, the trial court did not

clearly err by rejecting Mitchell's explanation..." (Emphasis added) See page 14A, infra. No other reason was given by the Court for affirming the trial court's rejection of Petitioner's explanation. It is noteworthy that both lower courts (trial and District) were silent on Petitioner's explanation of this matter, i.e., they rejected Petitioner's argument simply by ignoring it. Thus, we have the first explanation of why the courts may not consider appeal arguments in cases where a government agency is the underlying adversary.

Furthermore, the Fifth Circuit made many erroneous statements in its opinion, leading to its adverse finding on sufficiency of the evidence, that were not made by either of the lower courts. Hence, the Fifth Circuit not only affirmed clear errors by the lower courts

without considering Petitioner's points and authorities and without checking the evidence, but the Court added to the list of errors on its own. It is hard to say whether this *escalation* of errors was done under the "presumption of agency regularity" or some other "silent" judicial assumption.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's holding that the income tax is a direct tax conflicts with decisions of this Court and results in trial courts proceeding with 26 U.S.C. 7203 prosecutions without subject matter jurisdiction.

The question presented relates to a jurisdictional challenge and involves a direct conflict with this Court that has profound universal consequences.

It is well settled that the trial court in a criminal case lacks subject matter jurisdiction if the charging instrument does not state facts that charge an offense.

Petitioner was charged by information with failing to make income tax returns (26 U.S.C. 7203). In order to properly charge the offense of failure to file, the information must state facts that show Petitioner was subject to the filing requirement. This must be done

before any consideration is given to facts that show a requirement to file that pertains only to those persons who are subject to such a requirement.

All criminal prosecutions in the Fifth Circuit, for failure to file income tax returns, proceed under the assumption that the income tax is a direct tax. This conflicting assumption allows the Government to prosecute without stating facts that charge an offense. Hence, the magnitude of the primary question presented.

The class of the income tax, i.e., whether it is a direct or indirect tax, determines the subject of the tax. The subject of the tax determines what facts must be stated in the charging instrument in order to properly charge an offense. Thus, the class of the income tax is of paramount importance. If the tax were a direct tax, then it would be imposed on

the income and "income" would be the subject of the tax. In such case, the receipt of gross income (exceeding the exemption amount), would establish a filing requirement, with no other considerations, and Petitioner would not have a valid claim that the Government failed to charge an offense.

It is necessary to settle the primary question regarding the class of the income tax. This will then settle all jurisdictional questions that depend on the nature of the tax.

There is wide spread confusion among the circuits on the question of whether the income tax is direct or indirect. The Fifth Circuit holds that the Sixteenth Amendment provides for a direct tax on income without apportionment among the States. This contention is false. The Supreme Court is the authority.

> The contention that the (16th) Amendment treats a tax on income as a direct tax...is...wholly without foundation..."
> Brushaber v. Union Pacific R.R. Co., 240 U.S. 1, 18 (1916)

> (T)he Sixteenth Amendment conferred no new power of taxation, but simply **prohibited** the...power of income taxation...from being taken out of the category of indirect taxation **to which it inherently belonged,** and being placed in the category of direct taxation. (Emphasis added)
> Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916)

Thus, the Fifth Circuit is in conflict with prior decisions of this Court.

Petitioner will show that the conflicting precedent, which prevails in the Fifth Circuit, relieves the Government from having to state facts in its charging instrument that properly charge an offense.

If "income" were the thing being taxed, it would be proper to use the receipt of "income", or "gross income", as the gauge by which to determine

whether or not an individual is required to file an income tax return. But decisions of this Court confirm that "income" is not the subject of the tax. There can be no doubt that the Supreme Court has held the income tax to be an indirect tax. The question now arises: What is the subject of the income tax? The Congressional Record provides the answer.

> The income tax is, therefore, not a tax on income as such. It is an excise tax with respect to certain activities and privileges which is measured by reference to the income which they produce. The income is not the subject of the tax; it is the basis for determining the tax. Congressional Record of the 78th Congress, Volume 89, Part 2, March 27, 1943 at page 2580.

This Court provides further explanation.

> A tax laid upon the happening of an event (activity), as distinguished from its tangible fruits (income), is an indirect tax...
> (Parentheses added)
> Tyler v. United States, 281 U.S. 497, 502 (1930)

The information filed against Petitioner states that he was "required by law" to make a return by reason of receiving so much "gross income". Receipt of "gross income" in excess of a certain amount, then, was the only parameter used for alleging that Petitioner was required to file returns.

The information fails to state facts that show Petitioner had engaged in any taxable activity, or accepted any taxable privilege. No accusation is made that he was subject to the tax and thereby subject to filing requirements. Obviously, not everyone in the world is subject to a "gross income" test as the sole determining factor for whether or not one must file an income tax return. Facts must first be alleged that subject an individual to such test. This was not done in Petitioner's case. It was not done because of the erroneous Fifth

Circuit precedent that the subject of the tax is "income", thus reducing the filing requirement solely to the receipt of "income".

Government arguments in "failure to file" cases frequently claim that the income tax lies somewhere outside the two classes of taxes, being neither direct nor indirect. The proposition, wide spread among the circuits, that the Sixteenth Amendment did away with any consideration as to whether the income tax is direct or indirect is dispelled by this Court in post-16th Amendment decisions. It must be one or the other.

> In the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes... Brushaber, supra at 13
>
> ...the confusion is not inherent, but rather arises from the conclusion that the Sixteenth Amendment provides for a hitherto unknown power of taxation, that is, a power to levy an income tax which although direct should not be

> subject to the regulation of apportionment applicable to all other direct taxes. And the far-reaching effect of this erroneous assumption will be made clear... (Emphasis added)
> Brushaber v. Union Pacific R.R., supra, at 11
>
> (The proposition that the 16th) Amendment authorizes only a particular character of direct tax without apportionment...if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. (Emphasis added)
> Brushaber, supra, at 11, 12

Much of the confusion comes from the name of the tax. Any tax can be given any name. An income tax does not mean the tax is imposed upon the income, or that income is the thing taxed. If a tax is imposed indirectly on income, then income measures the tax, but it is an activity, event or privilege that is being taxed. The name of the tax does

not disclose the subject of the tax.

The IRC consistently treats all internal revenue taxes as indirect taxes. Code section 6011 provides that only those persons made liable for the tax are subject to filing requirements. Petitioner is prepared to show, in an appeal brief, that the Code establishes taxable activities for all internal revenue taxes including the income tax, and identifies the category of persons who are liable for the ensuing tax.

Now it can be seen how the subject of the tax determines what facts must be stated by the Government to properly charge an offense in a "7203" prosecution. Obviously, the assertion of "gross income" is not sufficient when the subject of the tax is not "(gross) income". A proper charging instrument must contain facts that relate to the subject of the tax, not what is used to

measure the tax. Hence, the information in a "7203" case must state facts that identify the taxable activity or privilege in which the accused was engaged, along with facts that provide the nexus between the accused and the activity or privilege.

The tax results from the subject of the tax (taxable event), not from the thing used to measure the tax (income). It is nonsense to allege only that the accused received something used to measure the tax without asserting facts that invoked the tax the first place. It is much more than nonsense. It denies the trial court subject matter jurisdiction.

The importance of the proposed question is epochal. The nature of the income tax (direct vs. indirect) is universal in scope. It affects the

proper charging of an offense in all criminal cases involving the income tax laws where it is necessary to show that the accused is "subject to any tax imposed by this title (IRC)". See 26 U.S.C. 7701(a)(14). Accordingly, it bears directly on subject matter jurisdiction.

Presently there is an irreconcilable conflict among the circuits, as well as with this Court.

> (T)he sixteenth amendment was enacted for the express purpose of providing for a direct income tax. Parker v. C.I.R., 724 F.2d 469, 471 (5th Cir. 1984)

> ...taxes on income from one's employment are **not** direct taxes and are not subject to the necessity of apportionment. (Emphasis added) Ficalora v. C.I.R., 751 F.2d 85, 87 (2nd Cir. 1984)

> The 16th Amendment eliminated the indirect/direct tax distinction as applied to taxes on income. U.S. v. Turano, 802 F.2d 10, 12 (1st Cir. 1986)

It just cannot be all three ways. These

three cases are cited simply to show the tip of the iceberg regarding the confusion among the various courts of appeals.

The Eighth Circuit's precedent setting decision that the income tax is a direct tax, is beyond belief. Here the Court omitted the key word "prevention" in order to completely **reverse** the meaning of the applicable Supreme Court cite. **Supposedly** citing from the 191 word sentence on page 19 of the Brushaber case, supra, the court said:

> (the purpose of the Sixteenth Amendment was to take the income tax "out of the class of excises, duties and imposts and place it in the class of direct taxes").
> U.S. v. Francisco,
> 614 F.2d 617, 619 (8th Cir. 1980)

What the court ignored was the word "prevention" which precedes that part of the sentence it cited. Read correctly, the purpose of the Sixteenth Amendment was:

> (T)he **prevention** of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself and thereby take an income tax out of the class of excises, duties and imposts and place it in the class of direct taxes. (Emphasis added) Brushaber, supra, at 19.

In other words, the purpose was to **prevent** taking an income tax out of the class of excises (indirect taxes)...and placing it in the class of direct taxes. Not only did the 8th Circuit ignore the word "prevention", it ignored everything the Brushaber Court said on the preceding 10 pages and ignored the prior cases on which the Brushaber Court relied. It also ignored the clear statement on page 112 of the Stanton case, which is much more precise regarding the purpose of the amendment:

> ...the provisions of the Sixteenth Amendment conferred no new power of taxation, but simply **prohibited** the...power of income taxation... from being taken out of the

> category of indirect taxation to which it inherently belonged, and being placed in the category of direct taxation. (Emphasis added) Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916)

Given the erroneous Fifth Circuit precedent on the nature of the income tax, appeals based on prior decisions of this Court are futile. If the present reign of confusion is not rectified for all circuits, subject matter jurisdiction of trial courts will be falsely assumed, theories of defense will be frustrated, and the handling of appeal points and authorities will be misplaced. Appellants with valid arguments will be stymied at the first appellate level with no further recourse.

The question presented, with its subsidiary questions, begs to be reviewed. The convoluted confusion and misunderstanding must be clarified and resolved. The fundamental right to due

process depends on the right to clearly understand of the law.

> The citizen is exempt from taxation unless the same is imposed by clear and unambiguous language, and any doubt is to be resolved in favor of the one against whom the tax is sought to be laid.
> Spreckels Sugar Refining Co. v. McClain, 192 US 397

II.

The Fifth Circuit's rejection, without consideration, of an appellant's documented arguments on appeal, solely on the basis of an irrebuttable "presumption of agency regularity", greatly endangers the fundamental right to due process.

The far reaching effect of the "presumption of agency regularity", as applied by the Court of Appeals for the Fifth Circuit, is a case of first impression and urgently requires resolution by this Court.

The inception of this controversial issue came to light in this case when the Government attempted to show at trial

that the absence of a single code (the "150" code) on Petitioner's coded Individual Master File (IMF) showed that he had failed to file his tax returns. Petitioner presented a logical, compelling explanation for why the 150 code could not have appeared on his IMF, even though the Internal Revenue Service (IRS) received his filed returns.

It was established at trial that the 150 code means "return filed and tax liability assessed". Therefore, the absence of this code clearly means that no return was filed and tax liability assessed. It obviously does not necessarily mean that no return was filed. A return could very well have been filed but not have completed the assessment process and therefore not be posted to the IMF. There was no disagreement between the parties on the

fact that Petitioner's returns, even if received by the IRS, were not assessed. The statutory limitation period for the assessment of all returns in question was still running at the time Petitioner's IMF was frozen (by freeze code 914 posted in January of 1987). See 26 U.S.C. 6501(a). After the freeze was put into effect, it would have been impossible for any returns, even if they were assessed, to be posted to the IMF. See U.S. v. Buford, 889 F.2d 1406, 1408 n.4 (5th Cir. 1989).

The Government relied on the absence of the 150 code as the exclusive documentary evidence for allegedly showing that Petitioner had failed to file. Hence, the argument rebutting this evidence was crucially important in any review on appeal. The rebuttal argument was solid, in fact, conclusive, as it was based on simple, elementary logic that

was irrefutable per se. At no stage in the proceedings did the Government, the trial court (fact finder) or either reviewing court, consider Petitioner's explanation or attempt to contradict it in any way.

In its opinion (p. 14A, infra), the Fifth Circuit summarizes Petitioner's explanation of why the absence of the 150 code does not show that Petitioner failed to file returns. /2 The Court, however, made no attempt to show that his explanation was not valid or to show any discrepancies, fallacies, flaws or defects therein. Instead, on page 6

/2 The Court states three of Petitioner's reasons for why the 150 code could not be posted to his IMF. The first reason is couched correctly, but the other two are incomplete and misstated. The important point is that the Court claimed no discrepancies in the arguments as stated. In addition, Petitioner's argument that "the 914 freeze code would have prevented posting of his returns" was not addressed.

and 7 of its opinion (page 14A, infra), the Court states, "Given the presumption of agency regularity, the trial court did not clearly err by rejecting Mitchell's explanation of the 150 codes." (Emphasis added) Thus, without consideration of its merits, a vitally important argument on appeal was rejected by the Appellate Court solely on the basis of the "presumption of agency regularity".

This rejection of Petitioner's argument by the Fifth Circuit is especially significant when it is realized that the lower courts also had not considered the argument. It would be one thing to uphold a lower court's poorly reasoned rejection of the explanation under the "presumption of agency regularity", but yet a different anomaly to use such presumption to excuse a "rejection" that was made for no reason

whatsoever.

The "presumption of agency regularity" seems to be so powerful that even the District Court's opinion, where it is ***favorable*** to Petitioner, is rejected by the Fifth Circuit. On page 7 of its opinion, (pages 42A-43A, infra) the District Court states, "if a taxpayer fails to file a tax return, the IRS clerk inputs a specific code into the taxpayer's IMF." Given the fact that no such codes were found on Petitioner's IMF for any of the prosecution years, the District Court has positively proven that the record shows Petitioner filed his returns. The Fifth Circuit not only failed to consider Petitioner's argument on this point, but the District Court's supporting confirmation as well.

Many lower court errors, rebuttal arguments and evidence are unaddressed by the Fifth Circuit. Moreover, the

Appellate Court's opinion contains many *original* errors and misstatements not made in the lower courts. It is not clear whether this same "presumption" is the cause of *all* indiscretions; but given no other explanation, it is likely the presumption was applied across the board. This likelihood, or possibility, adds still more weight to the importance of review by this Court.

Petitioner has been told by lawyers that the federal courts operate under a "silent judicial notice" when a government agency has a vested interest in the outcome of a case. Is this perhaps the "presumption of agency regularity"? There is also the "presumption of government correctness". These matters must be clarified. To what extent can the Government benefit from these presumptions? Now that the Fifth

Circuit has identified the presumption it employs to overlook lower court errors, evidence unfavorable to the Government, and compelling appeal points and authorities, this Court has the grounds for resolving the matter once and for all.

This issue has far reaching effects in our judicial system. The question becomes one of due process. The subsidiary questions are numerous and important.

Is the "presumption of agency regularity" a rebuttable presumption? Does an appellant have the right to have his rebuttal points and authorities considered on appeal? When rejected, does he have the right to know the discrepancies in his arguments and why they are without merit? When affirming convictions, must appellate courts include in their opinions the reasons for

rejecting the appellant's points and authorities? Is a government agency bound by its own official, self-authenticating records (in this case the IMF) when such records are used by the Government in its case in chief against the accused? Or are such records immune from scrutiny under the "presumption of agency regularity"?

When a lower court commits an act of judicial misconduct, or at the very least abuse of discretion, prejudicial to the accused, and such act is stated in the appeal brief as rebuttal to the Government's case, must the appellate court disclose in its opinion the reason(s) for rejecting or not considering such evidence?

In addressing this last question, specific examples from the instant case illustrate the importance of settling

this matter: (1) When the trial court as the fact finder fabricates evidence of a confession which it finds "significant" in arriving at its verdict of guilty. Findings #25 and #30. (2) When the trial court, in its Findings of Fact, changes the wording of defendant's written correspondence, which was admitted into evidence, to impugn the defendant's credibility and then uses this to impeach his direct testimony. Finding #35.

The Fifth Circuit' opinion also provides another telling example. The ourt actually changed the wording of the trial court's Finding (#75) in order to convert Petitioner's disagreement with the IRS into a disagreement with the law (IRC), thereby impermissibly establishing willfulness. Does the Fifth Circuit construe IRS "regularity" to mean the agency is equivalent to the law?

The matter before this Court involves a question that must be reviewed now. Petitioner feels that the grievous errors involved in this case and the injustice perpetrated are more than sufficient reasons "to call for an exercise of this Court's power of supervision." The opinion of the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings, (and) sanctioned such a departure by a lower court", that the standard for review is plainly met by such departures alone. And when such departures are made under a court-invoked irrebuttable "presumption", "special and important reasons" for granting this petition are clearly demonstrated.

It is hard to believe that there are other circuits that employ this "presumption" in the same manner as the

Fifth Circuit. If not, then this involves a conflict among the circuits. If, on the other hand, it involves a universal practice of rejecting rebuttal evidence on a "presumption", then there is a conflict with this Court's due process doctrine and the Constitution's Fifth and Fourteenth Amendment rights. Either way, the question calls for the exercise of this Court's supervisory power over the federal judicial system.

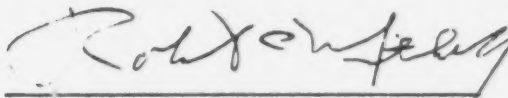
The importance of this matter applies to the public as distinguished from importance to the particular parties involved. This petition does not ask the Court to grant certiorari merely to review evidence and discuss specific facts. Petitioner represents all appellants who wish to exercise their right to rebut the government's case on appeal and receive a fair and impartial review by the courts of appeals.

The status of the law regarding the "presumption of agency regularity" cries out to be clarified. The scope and limitations of this "presumption" must be defined. The right to due process hangs in the balance.

This Court is asked to consider the consequences of allowing these crucial issues to go unreviewed and unresolved. The repercussions of allowing this vital question to go unsettled will be wide spread and affect the rights of many. It is not a matter of the question being settled by future appellate court decisions. It will not work itself out through future litigation. Without this Court's intervention, the federal appellate courts are the last resort. And the Fifth Circuit has settled this question in a manner that erodes the doctrine of due process and impairs the

interest of justice. This travesty will prevail if not reviewed by this Court.

Respectfully submitted,



Robert C. Mitchell
sui juris
#1 Pine Point Drive,
Apt 404
Bastrop, Texas 78602
512-332-5088

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT C. MITCHELL, Petitioner,

v.

UNITED STATES, Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT C. MITCHELL
#1 Pine Point Dr. #404
Bastrop, Texas 78602
(512) 332-0588
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Bastrop, Texas 78602
(512) 332-0588
Pro Se

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8293

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT C. MITCHELL,
Defendant-Appellant.

Appeal from the United States District Court for the Western District Of Texas

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ON PETITION FOR REHEARING
(August 17, 1994)

Before GARWOOD and EMILLO M. GARZA, Circuit Judges, and NOWLIN,* District Court Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

Wilt Garwood /s/
United States Circuit Judge

* District Judge of the Western District of Texas, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8293

D.C. Docket No. A-CR-89-122-SS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT C. MITCHELL,
Defendant-Appellant,

Appeal from the United States District Court for the Western District of Texas

Before GARWOOD and EMILIO M. GARZA, Circuit Judges, and NOWLIN,[1] District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

July 21, 1994

[1] District Judge of the Western District of Texas, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8293

Filed
Jul 21
1994

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT C. MITCHELL,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

(A-CR-89-122-SS)

Before GARWOOD and EMILIO M. GARZA, Circuit Judges, and NOWLIN,* District Judge.**

* District Judge of the Western District of Texas, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

GARWOOD, Circuit Judge:

Defendant-Appellant, Robert C. Mitchell (Mitchell), was charged by information with four misdemeanor counts of willful failure to file federal income tax returns for the years 1983, 1984, 1985, and 1986, in violation of 26 U.S.C. § 7203. Mitchell orally waived his Sixth Amendment right to a trial by jury, and the matter proceeded to a bench trial. A magistrate judge found Mitchell guilty on all counts and sentenced him to serve three consecutive one-year terms of imprisonment for the first three counts and a consecutive five-year term of probation for the fourth count. The court also ordered Mitchell to pay a $5,000 fine and a $100 special assessment. The district court affirmed the conviction but allowed Mitchell to remain free on bond pending this appeal. Mitchell brings this appeal *pro se*

claiming (1) the evidence was insufficient to support his conviction, (2) the trial court erred by admitting certain documentary evidence, (3) he was denied effective assistance of counsel, and (4) his waiver of jury trial was involuntary due to an improper agreement with the government. We find that the evidence adduced at trial was sufficient to support Mitchell's conviction; thus, he is not entitled to an acquittal. However, the record reflects that Mitchell waived his right to a jury trial based on his understanding that the government, with the magistrate judge's approval, had agreed that if he did so he would remain free on bond pending appeal from any conviction. Under the particular facts here, as reflected by record, we think a sufficient doubt as to validity of the waiver exists so that the

conviction should be vacated and the cause remanded for a new trial.

Facts and Proceedings Below

Robert Mitchell undoubtedly does not like to pay taxes, nor does he believe he is obligated to do so. Since the mid-1970's, he has attended numerous seminars on tax avoidance and has extensively studied the Internal Revenue Code (IRC). Although he has no formal legal training, Mitchell has acquired an impressive knowledge of the federal income tax law. Unfortunately, this knowledge, as is often the case, has proven to be quite a dangerous thing. Around 1984, Mitchell began a five-year campaign of correspondence with the Internal Revenue Service (IRS) regarding his disagreements with the IRC. He expressed several theories as to why he was not legally obligated to pay taxes, none of which the IRS ever accepted.[1] The IRS

repeatedly informed him of his duty to file returns and pay taxes, but he failed to do so for any of the prosecution years.

At Mitchell's trial, Kay Jones (Jones), a representative of the Fresno IRS Service Center, testified that she caused a search to be made to determine if Mitchell had filed any tax returns for the years in question. Her search indicated that Mitchell had not filed any tax returns with the Fresno Center or anywhere else in the United States. Jones added that had Mitchell filed any returns they would have been kept by the service center because the IRS was

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[1] Mitchell's theories were, by his own admission, quite unconventional. For example, Mitchell did not consider himself a "person" as the IRC defined the term, nor did he choose to regard his salary as "compensation." Not surprisingly, the IRS deemed his theories "confused, frivolous, and meritless."

required by law to keep all filed returns. Next, an Austin IRS official, Lorna Bradford (Bradford), testified that she conducted a similar search that yielded the same result - that Mitchell had not filed any returns with the Austin Center nor anywhere else in the United States. The Court also admitted a transcript of Mitchell's "individual master file" (IMF), an on-going record of his tax filings from 1978 through 1987, and the IRS information manual translating the IMF codes. According to the information manual, the IMF would contain a transaction code 150 (150 code) for each year that a return was posted, meaning that a return had been filed and tax liability had been assessed. Bradford testified that Mitchell's IMF did not contain 150 codes for any of the prosecution years.

In January 1987, the IRS placed a

criminal investigation freeze code (914 code) on Mitchell's account which served to notify IRS officials that the taxpayer was under investigation. The 914 code prevented further posting of returns during the investigation, instead any subsequent returns would be received by the 914 control clerks. Bradford testified that she checked the records of the 914 control center and did not find any returns filed by Mitchell. In addition, the special agent investigating Mitchell's case testified that no such returns were ever received by the 914 control center.

Mitchell admitted that he did not file conventional tax returns for the years 1983 to 1986. He claimed that, while continuing to deny any tax liability, he did file incomplete, "protest" tax returns. He described the

protest returns as essentially blank IRS forms containing little information other than his name. Although the protest returns were devoid of any information regarding his income, Mitchell maintained that he satisfied his obligation to file a return by attaching his W-2 forms to the protest return.[2] He presented what he claimed were copies of these protest returns at trial but testified that he

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[2] The protest returns that Mitchell claims to have filed clearly would not have satisfied his obligation to file a return because they did not contain sufficient information to allow the IRS to assess his tax liability and were not signed under penalty of perjury. *See United States v. Reed*, 670 F.2d 622, 623 (5th Cir.), *cert. denied*, 102 S.Ct. 2945 (1982). What is not quite so clear, however, is whether Mitchell believed the protest returns were sufficient. To violate 26 U.S.C. § 7203, the defendant must *willfully* fail to file a return. The trial court made no factual finding regarding Mitchell's knowledge as to the sufficiency of these returns. In any event, we need not presently address the adequacy of the findings in this respect because Mitchell's conviction will be overturned on unrelated grounds.

did not keep copies of the W-2 forms.

Mitchell waived his right to a jury trial and the case proceeded to trial before a magistrate judge. The magistrate judge did not believe Mitchell's testimony that he had filed any returns, even protest returns, for the years in question. The magistrate judge also considered such evidence as a recorded interview of Mitchell by IRS agents in which Mitchell refused to answer certain questions pertaining to his alleged failure to file and the fact that he claimed to have kept copies of the protest returns but had not kept copies of the assertedly (sic) attached W-2 forms. The magistrate judge found that Mitchell was required to file a tax return in each of the prosecution years, that he failed to file the returns as required, and that his failure to do so was willful given his knowledge of the

IRC and repeated inquiries to the IRS. Thereafter, on Mitchell's appeal, the United States District Court for the Western District of Texas affirmed the conviction and sentence.

Discussion

I. Sufficiency of the evidence

In judging the sufficiency of the evidence, this Court reviews the evidence in the light most favorable to the government and affirms "if a rational trier of fact could have found that the government proved all essential elements of the crime beyond a reasonable doubt." *United States v. Puig-Infante*, 19 F.3d 929, 937 (5th Cir. 1994). We will uphold the trial court's credibility determination unless clearly erroneous. *United States v. Bass*, 10 F.3d 256, 258 (5th Cir. 1993). To establish an offense of willful failure to file a tax return,

the government must prove that Mitchell (1) was required to file a return, (2) failed to file as required, and (3) his failure to do so was willful. *United States v. Doyle*, 956 F.2d 73, 74 (5th Cir. 1992). Mitchell contends the evidence presented at trial was insufficient to prove (1) that he actually failed to file tax returns for the years 1983 through 1986, or (2) that he did so willfully. He is wrong. In both instances, the evidence is sufficient to support the conviction.

First, Mitchell argues that the absence of a 150 code on his IMF does not prove he failed to file a return but merely that his return was not posted and tax was not assessed. Because the returns he claimed to have filed were incomplete, he argues they would not have been processed and thus would not have received a 150 code, nor would any

returns received after 1987 due to the 914 freeze codes. Given the presumption of agency regularity, the trial court did not clearly err by rejecting Mitchell's explanation of the 150 codes. In addition, the government properly refuted his argument that the 914 freeze code would have prevented posting of his returns. The freeze would not have affected returns filed prior to 1987, and any unposted returns would have been routed to the 914 control center, which Mitchell's alleged returns were not. Thus, the trier of fact could reasonably conclude that no returns had been filed for the years in question.

Similarly, the trier of fact was justified in rejecting Mitchell's argument that his tax returns may have gotten "lost in the mail" for four consecutive years. During the period in

question, the IRS had received and responded to Mitchell's numerous tax protester correspondences, all of which had been sent by certified mail with return receipt requested. But Mitchell contends he sent the disputed tax returns by ordinary mail, and the IRS either did not receive them or did not properly process them. We cannot say the trial court was clearly erroneous in doubting Mitchell's credibility on this matter. Nor did the court clearly err in concluding that, while Mitchell kept copies of nearly all of his dealings with the IRS, he failed to keep copies of his W-2 forms because he did not actually prepare the alleged protest return copies until after he learned he was under investigation.

There was also sufficient evidence from which it could be found that Mitchell's failure to file was willful.

To prove willfulness, the government must show that Mitchell intentionally and voluntarily violated a known legal duty. *Cheek v. United States*, 111 S.Ct. 604, 610 (1991); *Doyle*, 956 F.2d at 73. Although Mitchell claims the evidence does not prove he "knew" he was required to file a return, his "profound disagreement" with the IRC does not negate willfulness. *Cheek*, 111 S.Ct. at 610-611. As much as he may have detested the IRC, Mitchell was adequately familiar with its provisions. He also received several responses from the IRS prior to 1984 concerning his duty to file a tax return and had been advised by an attorney that his failure to file would risk prosecution. Thus, a rational finder of fact could conclude that Mitchell willfully failed to file his returns.

II. Waiver of jury trial

Except for petty offenses and certain contempts, all criminal prosecutions are to be tried before a jury "unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Fed. R. Crim. P. 23(a).[3] The importance of a written waiver cannot be understated. More than simply memorializing the defendant's consent, the presence of a writing "impress(es) the defendant with the gravity of the right he is about to relinquish." 8A Moore's Federal Practice 23.03(2)(b) at 23-14 (1994). When presented with a written jury waiver, the district court normally need make no further inquiry

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[3] Rule 58(a)(2) provides that the general rules, including Rule 23(a), apply to non-petty misdemeanor cases tried before a magistrate judge. *See Gomez v. United States*, 109 S.Ct. 2237, 2245 (1989).

into the defendant's desire to proceed without a jury. *United States v. Gordon*, 712 F.2d 110, 115 (5th Cir. 1983); *United States v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2908 (1982). The record in the instant case, however, contains no written waiver and indicates that none was ever made. Nevertheless, this Court recognized that strict compliance with the written component of Rule 23(a) is not always required. *United States v. Page*, 661 F.2d 1080, 1083 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982). We will uphold the validity of an oral jury waiver if it clearly demonstrates that, with the effective aid of counsel, the defendant voluntarily, knowingly, and intelligently consents to waiving his constitutional right to a trial by jury. *Id.*

Mitchell initially requested a jury

trial, and a panel had been selected. Prior to the start of trial, Mitchell's counsel conducted off-the-record discussions with the prosecutor and the magistrate judge. Shortly thereafter, Mitchell announced his intention to waive his Sixth Amendment right to a trial by jury. He now argues that this waiver was involuntary because the magistrate judge told him that if he agreed to a bench trial and was convicted he could avoid incarceration pending appeal. The record sufficiently supports Mitchell to warrant vacation of the conviction and remand of the matter for a new trial.

At sentencing, the magistrate judge granted Mitchell's request to remain free on bond, stating:

> "(T)he agreement entered into prior to the trial of this case by the defendant, his attorney of record, the United States Government, and approved by the court that I will find under the provisions of 3145, Subsection C, that

special exception - circumstances exist and that I will allow the defendant to remain free on bond under the provisions of 3143 and 3142, as I will find by clear and convincing evidence that he does not pose a danger to the safety of the persons in the community and is not likely to flee and that the appeal is not made for the purposes of delay but raises substantial questions of law or fact."

While the courts may frequently be lenient in allowing a defendant to remain free on bond prior to trial or sentencing, under 18 U.S.C. § 3143(b)(1) the court "shall" order the detention pending appeal of a defendant sentenced to imprisonment unless there exists a substantial chance of reversal on appeal. Absent such a finding, the fact that the defendant is not a threat to the community and is not a likely candidate for flight does not of itself justify release pending appeal. *Id.*[4] In this case. however, the magistrate judge departed from section 3143(b) and clearly acknowledged some form of agreement

connecting Mitchell's release with his waiver of a jury trial. The magistrate judge's written order states that:

> "(T)he defense and the Government, with Court approval, had agreed to allow the defendant to remain on bond pending appeal of his conviction if the defendant waived his right to a jury trial at the time of the trial of this cause. In honor of that agreement, this Court will make findings that exceptional circumstances exist and will continue the defendant on the same bond as previously entered by this Court . . . ."

In addition, Mitchell's colloquy with the magistrate judge at the sentencing hearing also evinces an agreement with the government linking his ability to remain free on bond with his waiver of a jury trial. The exchange went as follows:

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4 18 U.S.C. § 3142 relates to pretrial detention. 18 U.S.C. § 3145(c) deals with appeal from a detention order; its last sentence, which refers to "exceptional reasons," relates only to those detained under section 3143(a)(2) (detention after trial and before sentence) or under section 3142(b)(2) (serious felonies) provided they meet the conditions of section 3143(b)(1).

"MITCHELL: I do want to again request and urge the court to give me an opportunity to appeal this case. And the only way, of course, that I can do that is pursuant to the agreement that was made on February 11th, 1991, a stay pending appeal so that I can at least have some input in the appeal. And that's all I'm going to say.

THE COURT (To Mitchell's counsel): Mr. Morris, let me just ask you, on that February, '91, what - was that agreement in writing?

MR. MORRIS: It's on the record, I believe.

MR. HARRIS (prosecutor): I believe that's correct. We discussed it in open court at the start -

* * * *

MR. MORRIS: The agreement was that Mr. Mitchell could agree to waive his right to trial by jury and, as a part of that, the court agreed that he would be allowed to remain on bond pending appeal in this case if he had a conviction, was my recollection.

THE COURT: That's my recollection what it was. Mr. Harris?

MR. HARRIS: Frankly, I remember that I agreed that I would join in with the request he remain free pending appeal. I forget whether or not the court was also a party to the agreement or not. But if the two of you recall it that way, then I will -

THE COURT: I think there was some discussion about that, and that's where I was unclear of - about whether it was in writing or not.

And my memory of the agreement was that if there was a conviction, and Mr. Mitchell was going to waive the jury, if there was a conviction, he was going to appeal it and that he would remain on bond to do that.

That was my recollection, and I can't remember whether I - I thought that you all's recollection and you all's agreement, and I can't remember if there was anything else attached to it at all.

MR. HARRIS: No, I think that was it."

Any agreement used by the government to entice a defendant into waiving a constitutional right to a jury trial in exchange for release on bond would be plainly invalid and could not be tolerated by this Court. Such an agreement, at the least, is contrary to public policy. We cannot dismiss it on the theory that the defendant and his counsel were freely able to bargain with the prosecutor and were in no way "coerced" into accepting the arrangement.

"For the evil in the (government's activity) is not that it necessarily *coerces* . . . jury waivers but simply that it needlessly *encourages* them." *United States v. Jackson*, 88 S.Ct. 1209, 1217 (1968) (emphasis in original). The government's conduct "need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right" such as the right to a trial by jury. *Id.* In *Jackson*, the Supreme Court held the Federal Kidnapping Statute unconstitutional because it exposed the defendant to the death penalty only upon conviction by a jury. *Id.* at 1216-17. In other words, a defendant could escape the threat of execution merely by abandoning his right to contest his guilt before a jury. While a rational defendant facing a possible death

sentence might view his rights under the Sixth Amendment as luxuries he would willingly forgo, the Court deemed the choice impermissible because such a tempting offer "needlessly penalizes the assertion of a constitutional right." *Id.* at 1217. As *Jackson* ruled that a defendant cannot trade his right to a jury to safeguard his life, neither can he barter away his rights to protect his liberty. We conclude that a jury waiver based on an impermissible agreement to remain free on bond must be held invalid.

The government now steadfastly denies making any such agreement with Mitchell. Rather it contends that: Mitchell, through his counsel, approached the government to inquire what its position would be regarding release after sentencing; the government informed him it would take no position on the matter; when the issue was raised before the

court, the magistrate judge informed Mitchell that it would be up to the district court to determine whether he would be released on bail, but that he would very likely be allowed to do so given the history of his case and his past actions; and at no time did the magistrate judge suggest that a jury waiver would be necessary.

While the government admits it had its own "strategic" reasons for not wanting to present its case before a jury, it maintains that Mitchell separately expressed his intent to waive a jury trial. Clearly, there can be no legitimate relation between a defendant's decision to waive his right to a trial by jury and the court's decision to allow him to remain free on bond pending appeal. The court should not even reach the bond question until after there has

been a conviction. And in that vain, the government now contends that these issues were not linked in any manner and that the magistrate judge fully explained the bond issue and then separately explained that the defendant had a right to a jury trial and that a jury panel was awaiting trial.

In any event, certain statements Mitchell made at trial indicate that he believed there was a necessary connection between jury waiver and release on bond. Thus, whether the government extracted some form of *quid pro quo* from the defendant or merely stepped aside and knowingly allowed him to proceed on an erroneous belief that these issues were interconnected, our result would not necessarily change. The magistrate judge informed Mitchell that "we have a jury available, and that if you, after consulting with Mr. Morris and Mr. Smith,

desire to waive that jury, you can waive that jury. And then the case would proceed to me on the trial . . . . Do you understand? Mitchell responded:

> "Yes, Your Honor, I do. And I want to make it clear to the Court that the reason for opting to this is with the understanding that I can obtain a stay during the appeal, because I think the appeal - if it comes to an appeal in this case, is going to be very signif-icant. And that's my main interest."

Rather than dispelling Mitchell's misconception, the magistrate judge simply responded, "I understand that." The magistrate judge should have clarified that jury waiver was irrelevant to the bond issue, and the court's failure to do so itself creates considerable ambiguity as to the voluntariness (sic) of the defendant's waiver.

Taken as a whole, the crucial aspects of the government's present position on this issue are simply not

supported by the record, which, to the contrary, strongly supports Mitchell.[5]

In these circumstances, a substantial and essentially unrebutted showing having been made that Mitchell's oral jury waiver was not voluntary, we should not sustain the bench trial conviction.

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[5] The government says that the magistrate judge's order and his, and the Assistant United States Attorney's, remarks at sentencing, are simply a confused error resulting from forgetfulness as to what had happened at trial, which was about thirteen months previous.

Under certain circumstances, we might consider a remand to determine what "really" happened. But there is no reason to think the prosecutor's (and defense counsel's) and magistrate judge's recollections would be any better now that at sentencing, when certainly none of them realized anything was wrong with the recited agreement (nor was this merely a slip of the tongue, as the magistrate judge's written order reflects). Nor does the government suggest any extra-record documentary proof or third party evidence which even tend to clarify (let alone clearly establish) the matter in its favor. Under the circumstances, we consider the only practical alternative to be vacation of the conviction.

Conclusion

Because of the circumstances surrounding and unrebutted record recitations respecting Mitchell's oral waiver of his right to a trial by jury, which strongly indicate that the waiver was involuntary, we vacate his conviction and remand for a new trial. Of course, Mitchell remains free to decide whether his interests will best be served by a trial before a judge or a jury, as long as he is allowed to make a fully informed and voluntary decision. We need not address Mitchell's remaining points of error as they are rendered immaterial by our disposition of the jury waiver issue.

VACATED AND REMANDED

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
IN THE AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff	*	(Filed Apr 5 '93)
v.	*	
	*	CAUSE NO.
ROBERT C. MITCHELL, Defendant	*	A-89-CR-122

Opinion

The Defendant was charged in a four count information with willfully failing to file a individual income tax return for the tax years 1983 through 1986 in violation of 26 U.S.C. § 7203. After a bench trial, the United States Magistrate Judge found the Defendant guilty on all four counts and sentenced him to three years confinement, a five year term of probation to run consecutively to the confinement, fined him $5,000.00 and ordered him to pay a special assessment of $100.00. Defendant appeals and this Court affirms.

The Court has jurisdiction pursuant

to 18 U.S.C. § 3402.

Defendant, in a brief filed by his attorney and another brief he filed himself, asserts seven points of error. In the brief filed by his attorney, he challenges the sufficiency of the evidence to support his conviction, claims the magistrate improperly admitted evidence, claims the factual findings pertaining to his intent are inconsistent with a finding of guilt, contends his waiver of a jury trial was not voluntary and insists he was denied effective assistance of counsel. In the brief he filed, he asserts many of the same arguments, and additionally, contends the government violated his right to a speedy trial and violated his due process rights.

Sufficiency of the Evidence and Clearly Erroneous Findings

To convict the Defendant of

willfully failing to file a tax return, 26 U.S.C. § 7203, the government must prove the Defendant was required to file a tax return; he failed to do so timely; and his failure to do so was "willful." See 26 U.S.C. § 7203. See also, Doyle v. United States, 956 F.2d 73, 74 (5th Cir. 1992) ("The elements of the misdemeanor of failing to make a return, 26 U.S.C. § 7203, are willingness (sic) and failure to make a return when due."). The evidence of guilt is sufficient if viewing the evidence in the light most favorable to the government a reasonable juror could have found the defendant guilty beyond a reasonable doubt. See, U.S. v. Eargle, 921 F.2d 56, 58 (5th Cir. 1991); United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982, aff'd, 462 U.S. 356, 103 S.Ct. 2398 (1983).

a. The Defendant was Required to File a Tax Return

Evidence that the Defendant's gross income for each year in question exceeded the threshold levels provided by the I.R.C. is sufficient to establish the Defendant was required to file a tax return. See, United States v. Wade, 585 F.2d 573, 574 (5th Cir. 1978), cert. denied, 440 U.S. 928, 99 S.Ct. 1264 (1979). The undisputed evidence established that the Defendant had income well in excess of the threshold levels for each year in question. The evidence was thus sufficient for a reasonable juror to find beyond a reasonable doubt that the Defendant was required to file a tax return for each year in question.

b. The Defendant Failed to File a Tax Return

The government introduced the Defendant's Individual Master File (IMF)[1]

[1]An IMF is a computer record containing a complete history of an individual's federal tax record.

to establish he had not filed a tax return for the years in question. His IMF does not contain a "TC 150" code. The Defendant contends this is the only evidence offered to establish he did not file a tax return for the years in question and insists that the absence of a "TC 150" code does not prove he did not file tax returns.

Kay Jones, a tax examining assistant with the IRS, and Lorna Bradford, an IRS employee who represents the director of the custodian of records in trials, each conducted a nationwide search of the Defendant's tax records by reviewing the Defendant's IMF. They testified the Defendant's IMF does not have a "TC 150" code for any of the years in question, and the absence of a "TC 150" code shows that the Defendant did not file a tax return for any of those years. Bradford also testified the IRS sent notices to

the Defendant requesting why he had not filed a tax return for any of those years. Bradford further testified she checked the records of the 914 control clerks for tax filings by the Defendant subsequent to the date the "914 Code" was placed on his IMF and their records indicated the Defendant did not file a return. Finally, the government introduced certified copies of Certificate of Assessment and Payments for the tax years 1983-1986 which established the Defendant did not file a tax return for any of those years. The evidence before the court was sufficient for a reasonable juror to find beyond a reasonable doubt that the Defendant had not filed tax returns for the 1983, 1984, 1985 and 1986 tax years.

The Defendant also contends the presence of certain codes and the absence

of other codes in the Defendant's IMF establishes he filed a tax return for the years in question. There is, however, no evidence that the presence or absence of these codes precludes a finding that he did not file a tax return or mandates a finding that he filed a tax return.

c. The Defendant's Failure to File was Willful and the Findings are Consistent With a Finding of Guilt

To establish a "willful" violation, the government must establish "the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Cheek v. United States, ___ U.S. ___, 111 S.Ct. 604, 610 (1991). The Defendant contends the government failed to prove that the Defendant "knew" of his duty to file a tax return. To establish knowledge, the government must establish the Defendant was aware of the duty. If

the Defendant in good-faith believes he is not required to file a tax return because he misunderstands the law or is ignorant of the law, the Defendant did not know of the duty and cannot be held liable. See, Cheek, 111 S.Ct. at 610-611. The Defendant does not contend that he is ignorant of the filing requirements, he does contend, however, he had a good-faith belief he was not required to file because of a misunderstanding of the law.

In his findings of fact, the Magistrate Judge found "the (D)efendant has a profound disagreement with the Internal Revenue Service over the proper interpretation of the Internal Revenue Code, his mere disagreement with the law is insufficient to negate the element of willfulness, which the Court finds the United States has proven beyond a reasonable doubt." See, Findings of

Fact, No. 75 (citations omitted). The Defendant contends the Magistrate Judge's finding "the (D)efendant has a profound disagreement with the Internal Revenue Service over the proper interpretation of the Internal Revenue Code" precludes a finding that he acted "willful" in failing to file his tax returns. The Court disagrees. The Magistrate Judge specifically found the Defendant knew he was required by law to file a tax return. See, Finding of Fact, No. 54 ("The only question remaining is whether the defendant's legal duty to file was in fact known by the defendant. The Court finds it was."). Finding 75 is not a finding that Defendant in good-faith believed he did not have to file a tax return. The Magistrate Judge merely found the Defendant disagrees with the I.R.S.' interpretations of the Internal

Revenue Code.

The evidence is sufficient for a reasonable juror to find the Defendant guilty beyond a reasonable doubt and the Magistrate Judge's findings of fact are not clearly erroneous.

Admission of Evidence

The Defendant contends the Magistrate Judge admitted evidence that should have been excluded under the hearsay rule. Although it is not clear from the Defendant's brief which evidence he contends was improperly admitted[2], the Court presumes he is complaining about the admission of government exhibits 22 (a W-4 form for the Defendant); 23-25 (substitutes for returns filed the (sic) IRS on behalf of the Defendant); 26 (the Defendant's IMF); and 28-31 (Certificate of Assessments and Payments for the Defendant which translates the coded IMF into a readable form). The Defendant

contends the documents should have been excluded as hearsay because they are "records, reports, statements, or data compilations... of public offices or agencies, setting forth... matters observed by police officers and other law enforcement personnel," Fed. R. Evid. 803(8)(B), and cites United States v. Quezada, 754 F.2d 1190 (5th Cir. 1985) for support. Quezada states "documents recording routine, objective

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[2]The Defendant does not identify which documents he contends the Magistrate Judge improperly admitted. He merely states: "The argument under the preceding points of error details the documentary Government record evidence herein. In this point, Mr. Mitchell will show the Court that this evidence should have been excluded as hearsay because it fell within the province of Fed.R.Evid. 803(8)(B) as a matter observed by a law enforcement officer." See, Appellant's Brief filed September 30, 1992, pages 36-37. Apparently, the Defendant does not believe the Magistrate Judge should have admitted the Defendant's exhibits 37 (the 6209 manual) or 38 (the Defendant's 1986 and 1988 IMFs). These are government documents "detailed" in the preceding points.

observations, made as part of the everyday function of the preparing official or agency" and "law enforcement reports prepared in a routine, non-adversarial setting" are inherently reliable and consequently, admissible under Rule 803(8). Id. at 1194. See also, United States v. Dancy, 861 F.2d 77, 79-80 (5th Cir. 1988). Contrarily, (sic) Documents prepared pursuant to the observation or investigation of a crime are not. Id.

The documents were not prepared pursuant to the investigation of the Defendant in this case. Rather, they record routine, objective observations - the taxpayer's filing history - and were made as part of the everyday function of the IRS. For example if a taxpayer fails to file a tax return, the IRS clerk inputs a specific code into the

taxpayer's IMF. If the taxpayer files a tax return, the IRS clerk inputs a different code. Likewise, if the taxpayer fails to file a tax return, the IRS clerk will prepare and file a substitute return for the taxpayer. Like the documents in Quezada, "(d)ue to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter..., such records are, like other public documents, inherently reliable." Id. Consequently, the documents are not excluded by the hearsay rule.

Furthermore, such records are absolutely necessary for the government to prove its case. Given the number of taxpayers and volume of tax returns and paperwork processed by the IRS each year, it is highly unlikely testimony by an IRS employee as to the filing history of an

individual taxpayer could be based on anything other than the information recorded by the IRS clerks. Id. at 1194-1194. (sic)

Effective Assistance of Counsel and Speedy Trial Act

The Defendant contends he was denied effective assistance of counsel because the time limit to try the Defendant under the Speedy Trial Act, 18 U.S.C. 3161 et seq., allegedly ran and trial counsel did not file a motion to dismiss based on the alleged Speedy Trial Act violation. A defendant is entitled to effective assistance of counsel under the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). If counsel fails to give "adequate legal assistance," the defendant is denied effective assistance of counsel. Strickland, 466 U.S. at 686, 104 S.Ct. at 2064. To prevail on a claim

of ineffective assistance of counsel, the defendant must show (1) the counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

The Speedy trial Act mandates that the trial of a criminal defendant commence within seventy days from the date the information is filed or the first appearance date. See, 18 U.S.C. § 33161(c)(1). (sic) The seventy day time limit, however, is not absolute. If the judge wants a continuance finding that the ends of justice served in granting or ordering the continuance outweigh the best interest of the public and the defendant in a speedy trial, the period of delay resulting from the continuance is excluded in computing the time period in which the defendant must be brought to

trial. See, 18 U.S.C. § 31631(h)(8). (sic)

The trial in this cause was set for October 9, 1990. The Defendant filed a motion for continuance on October 2, 1990, which the Magistrate Judge orally granted the same day and reset the trial for February 11, 1990. (sic) The Magistrate Judge did not enter a written order continuing the trial, so there is not a written "ends of justice" analysis. As of October 2, 1990, the seventy time period (sic) under the Speedy Trial Act had not expired.

Ordinarily the judge granting the continuance must make an "ends of justice" analysis either in writing or in open court. See, 18 U.S.C. § 3161(h)(8). However, where the basis for granting the continuance is clearly stated in the pleadings requesting the continuance or clearly stated in open court, the order

granting a continuance is sufficient to exclude the time under the Speedy Trial Act even though the judge does not make a written or oral "ends of justice" analysis. See, United States v. Bruckman, 874 F.2d 57, 62 (1st Cir. 1989). In his motion for continuance, the Defendant states:

> On the morning of October 1, 1990, Defense Counsel received a phone call from Regina Hart, attorney for the government, in which Ms. Hart informed counsel for the first time that the Government intends to offer evidence that substitute returns were filed for Defendant by IRS for tax years 1982, 1985 and 1986. Counsel for the Government further informed Defense Counsel that these substitute returns are responsible for the TC 150 codes on the 1985 and 1986 IMFs. (sic)
> Defendant is completely surprised by this new evidence offered by the Government... As has been pointed out by the Government in argument in open court the IMF is an extremely complex document which requires a great deal of expertise to interpret... Because the IMFs will now purportedly show the filing of substitute returns additional time is needed to examine the new IMFs to determine if the codes evidencing the presence of returns is (sic) the result of the substitute returns or returns filed by Defendant.

> Such and (sic) examination is not within the expertise of Defendant or Counsel and will require additional consultation with experts. Counsel for the government has informed counsel that the new IMFs will be available toward he end of the week before trial. There will not be sufficient time before trial to properly analyze the transcripts. Without adequate time to analyze the transcripts Defendant cannot possible (sic) prepare a defense.... Defendant and Defense Counsel represent to the Court that this motion is made in the interest of justice and not for the purpose of undue delay. Failure to grant this continuance would result in a miscarriage of justice. Further, the ends of justice served by granting this continuance outweigh the best interest of the public and the Defendant in a speedy trial.

See, Defendant's Motion for Continuance, filed October 2, 1990, pages 3-4. The reasons for the continuance are sufficiently set out in the Defendant's motion for continuance to satisfy the "ends of justice" analysis. It is clear, under the circumstances, the Magistrate Judge impliedly (sic) made a finding that the ends of justice served in granting the continuance outweighed the best interest of the public and the defendant

in a speedy trial, and this Court under the circumstances presented makes that finding. Furthermore, justice would not be served by allowing a defendant to file a motion for continuance and subsequently, successfully moving to dismiss the case because the judge did not make a written or oral "ends of justice" analysis. The Court does not believe Congress intended such a result in enacting the Speedy Trial Act. Consequently, there was no violation of the Speedy Trial Act and the Defendant's trial counsel was not ineffective in failing to file a motion to dismiss under the Speedy Trial Act.

Waiver of Right to a Jury Trial

The Defendant contends he did not voluntarily waive his right to a jury trial. He makes an outrageous claim that is nothing more than a distortion of the

record, that the Magistrate Judge entered into an agreement with the Defendant that if the Defendant would waive his right to a jury trial, the Magistrate Judge would allow the Defendant to remain free on bond during the appeal.

A criminal defendant must make a knowing and intelligent waiver of his right to a jury trial. To be a knowing and intelligent waiver, the defendant must understand the right he is waiving, be aware of the relevant circumstances, and be aware of the consequences of his waiver. See, United States v. Rosa, 946 F.2d 505, 507 (7th Cir. 1991). The evidence demonstrates the Defendant knew he had a right to a jury trial, knew the Magistrate Judge would determine guilt or innocence if he waived the jury, and was aware of all relevant circumstances surrounding the waiver.

The Defendant's claim that he waived

his right based on an agreement between himself and the Magistrate Judge is preposterous. The Defendant inquired whether he would remain on bond during appeal. The Magistrate Judge responded that the District Court had jurisdiction over any appeal, the District Court usually let the Magistrate Judge determine bond issues, and the Defendant would probably be allowed to remain on bond during appeal judging from the history of this case and the Defendant's past actions. The Magistrate Judge did not in any way, shape or form suggest that if the Defendant waived his right to a jury trial he would be allowed to remain free on bond during appeal or that his waiver of a jury trial would be considered in determining whether to allow him to remain free on bond during an appeal. Furthermore, the Defendant

did not condition his waiver on being allowed to remain free on bond during appeal. There is simply no evidence that the Defendant waived his right to a jury trial pursuant to an agreement, and all the evidence suggests that he knowingly and intelligently waived his right to a jury trial.

Due Process

The Defendant also contends he was denied due process. He contends the trial court lacked subject matter jurisdiction because no complaint was filed in this cause; the District Court lacks jurisdiction because there is not a statute conferring jurisdiction on the District Court in misdemeanor tax cases; he was not ready for trial; he was denied effective assistance of counsel; he was denied the right to defend himself; and the trial court refused to safeguard his rights. These points are

frivolous and do not merit consideration. Nevertheless, the Court will consider each. Complaints are not filed in criminal cases in Federal court. A criminal case is commenced by the filing of an information or an indictment. See, Fed, R. Crim. P. 7. The government filed an information. The District Court has jurisdiction over criminal tax cases. See, 18 U.S.C. 3231. The Defendant had more than enough time to adequately prepare for trial; he was not denied effective assistance of counsel; he was not denied his right to defend himself; and the trial court did not refuse to safeguard his rights.

The conviction is affirmed.

Entered the 2 of April, 1993.

Sam Sparks /s/

Sam Sparks United States District Judge

(Filed Mar 24 '92)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	()	
		CAUSE NO.
VS.	()	A-89-CR-122
ROBERT C. MITCHELL	()	

FINDINGS OF FACT PURSUANT TO RULE 23(c)

1. There are three essential elements which the United States must prove beyond a reasonable doubt:

a. The defendant was required by law or regulation to make a return of his income for the taxable year charged;

b. The defendant failed to make such return at the time required by law; and

c. The defendant's failure to make the return was willful.

United States v. Buckley, 586 F.2d 498, 503-504 (5th Cir. 1978, cert. denied, 440 U.S. 982 (1979).

2. The filing requirements are based on the amount of a taxpayer's gross income.

3. A single individual under the age of 65 was required to file a tax return for calendar years 1983 and 1984 if he had gross income of $3,300 or more. The threshold amount for 1985 was $3,430 and for 1986 it was $3,560.

4. The Court finds that for each year in question the defendant received gross income well in excess of these amounts.

5. The Court heard the testimony of Edward Thiele, Senior Vice President in charge of finance and custodian of records for Rowan Companies and its subsidiary ERA Helicopters (herein ERA) that the defendant was employed by ERA as a helicopter pilot and was paid for his services.

6. The Court admitted into evidence Government's Exhibit Nos. 6 through 9, inclusive, which are copies of the

defendant's paychecks from ERA. The Court also admitted into evidence Governments (sic) Exhibit Nos. 11 through 14, inclusive, which are Forms W-2 showing the wages, tips and other compensation paid to the defendant for each year in question. They show that the defendant received $19,062.59 for 1983, $31,219.19 for 1984, $35,658.30 for 1985, and $29,932.53 for 1986.

7. Further, the court admitted into evidence defendant's Exhibit 39, which is the tape recording of the special agents' interview with the defendant. In it, the defendant said that he did not dispute the accuracy of the Forms W-2 as the amounts he received for his services.

8. The Court also heard the testimony of Denise Kolling, who is a branch manager and custodian of records for Fidelity Federal Savings Bank that the defendant had accounts that paid

interest.

9. The Court admitted into evidence Government's Exhibit Nos. 18 through 20, inclusive, which are account ledgers. They show interest paid to the defendant in 1983 of $2,890.73, $1,780.20 in 1984 and $446.11 in 1985. No interest was paid to the defendant in 1986.

10. Thus, the Court finds that the defendant had gross income for the year 1983 in the amount of $21,953.31.

11. In 1984, the defendant's gross income was $32,999.39.

12. In 1985, the defendant's gross income was $36,124.41.

13. In 1986 the defendant's gross income was $29,932.53.

14. The Court further finds that the defendant was required to file tax returns for each year on or before the following April 15th.

15. The Court also finds that the defendant did not file tax returned (sic) for the years 1983, 1984, 1985 and 1986.

16. The Court heard the testimony of Kay Jones, the representative of the Fresno Service Center. She testified that she caused a search to be made to determine if the defendant had filed any tax returns for the years in question. Her search showed that the defendant had not filed any returns at all with the Fresno Service Center nor anywhere else in the United States.

17. Ms. Jones added that the IRS is required by law to keep anything that is sent to it. The Court admitted into evidence Government's Exhibit 22, which is a Form W-4 withholding statement dated June 29, 1983, that was filed by the defendant.

18. If the defendant had filed any returns as he testified he did, the

returns would have been kept by the Service Center and a record of them would have been made on the defendant's Individual Master File.

19. The Court also admitted Government's Exhibit Nos. 24 and 25, Substitutes for Returns, which were prepared by Service Center personnel for the limited purpose of showing that the IRS did not find filed returns for the 1986 and 1987 years.

20. The Court also heard the testimony of Lorna Bradford, the representative of the Austin Service Center and of the District Director for the Austin District of the IRS. She testified that she caused a search to be made to determine if the defendant had filed any tax returns for the years in question.

21. Ms. Bradford's search showed

that the defendant had not filed any returns at all with the Austin Service Center nor anywhere else in the United States. She added that if a return had been filed with another service center, it would have been processed there and the information from it would have been sent on to the Austin Service Center.

22. The Court admitted into evidence Government's Exhibit No. 26, titled Transcript of Account, but also referred to in testimony as an Individual Master File (IMF).

23. Ms. Bradford testified that Government's Exhibit No. 26 is an ongoing record of the defendant's account for the period 1978 through 1987 for the entire United States. She added that it is a complete history.

24. Ms. Bradford testified that the IMF shows that the defendant did not file tax returns for the years covered in the

bill of information. It also shows, as Ms. Bradford testified, that notices were sent by certified mail to the defendant asking why he had not filed returns.

25. Government's Exhibits Nos. 28 through 31, inclusive, were also admitted into evidence. Ms. Bradford testified that these contain the same information as Government's Exhibit No. 26 translated from the computer codes of Exhibit No. 26 into English. They show that the defendant failed to file a tax return for each of the years in question. They also show that the defendant's response to the notices asking why he had not filed returns was that he was not liable for the tax.

26. The objective documentary and testimonial evidence discussed above clearly shows that the defendant failed to file tax returns for each of the years

in question.

27. The defendant testified that he timely filed what he considered returns, and in support of this testimony, defendant's Exhibits Nos. 30, 31, 33 and 34 were admitted into evidence. The Court does not believe the defendant's testimony.

28. The defendant's testimony is contradicted by the other documentary and testimonial evidence in the case, and by the reasonable inferences to be drawn therefrom.

29. Specifically, the Court does not believe and therefore does not find that four different returns from four different years were improperly handled by the service center in such a way that they would not appear on the IMF.

30. The Court finds it significant that the defendant's response to the inquiry from the service center as to why

he had not filed returns was not that he had filed, but rather that he was not required to file.

31. The defendant has argued that the placing of the 914 codes would prevent the record from showing that the returns had been filed.

32. The testimony clearly showed, however, that the 914 codes could not have prevented returns from 1983 through 1985 from posting as they would have been posted prior to the placing of the 914 codes in January of 1987.

33. The testimony from both the Government's and the defendant's witnesses was clear that the 914 codes do not affect anything that has already been entered on the IMF.

34. Further, the Court does not accept the defendant's testimony that he relied on the Federal Register for the

proposition that essentially blank forms 1040 with Forms W-2 and 1099 attached sufficed as a return for several reasons.

35. First, the defendant's testimony was that he timely filed these. This would have occurred prior to the time that he wrote his employer in Government's Exhibit No. 52 that federal regulations are not law and do not have to be obeyed.

36. The defendant testified that it was not until late 1987 or early 1988, well after the years charged in the bill of information, that he learned that some regulations do have the force of law if they implement laws passed by Congress. Thus, his testimony is not consistent with his prior writings.

37. Second, the Federal Register on which the defendant claims reliance was published on September 11, 1946, a full ten years prior to the enactment of the

Internal Revenue Code of 1956, (sic) which contains the filing requirements in question.

38. As the evidence showed, the defendant has read the entire Internal Revenue Code of 1956 (sic) and has studied the sections that set forth filing requirements.

39. The Court does not believe that the defendant would have relied on a regulation promulgated pursuant to a superseded Internal Revenue Code.

40. The Court also finds that the falseness of the defendant's testimony is further shown by defendant's Exhibit No. 39, the tape recording of the special agents' interview with the defendant.

41. The defendant testified that no one ever asked him whether he had filed; yet, on the tape, the defendant is clearly asked if he remembers when he

last filed a tax return.

42. Rather than answering the question by saying when he allegedly filed a tax return, the defendant refused to answer the question by saying "(n)ow that's one of those personal privacy areas I don't want to get into."

43. The Court believes that had the defendant in fact timely filed returns, he would have had no objection to answering that question with the dates he had mailed Defendant's Exhibits Nos. 30, 31, 33 and 34.

44. Other reasonable inferences to be drawn from the evidence in the case also show that the Defendant's testimony was not credible.

45. The defendant testified that although he kept copies of the tax return forms he said he filed, he did not keep copies of the Forms W-2 and 1099, which he said he attached to the tax return

forms, despite claiming that he believed those Forms W-2 and 1099 were critical in order for his alleged filing to constitute a return.

46. The Court does not find this to be credible in view of the fact that the defendant kept copies of virtually everything else that he sent to the government over the course of a five-year letter-writing campaign.

47. The defendant testified that these copies amounted to "5 volumes" which form a stack "one or two feet high."

48. The Court finds that the reason that the defendant did not have copies of the forms W-2 and 1099, which he alleges he attached to Defendant's Exhibits Nos. 30, 31, 33 and 34, is that the tax return forms that he claims he filed were not prepared by him until after he learned

that he was being investigated for willful failure to file tax returns in 1987.

49. By then he did not have them to attach.

50. The Court further finds that the defendant's testimony that he sent these forms--which would be the most important of the considerable volume of mailings he sent to the IRS over a five-year period--to the service center by ordinary mail is not credible due to the fact that the vast majority of the defendant's mailings were sent by certified mail with return receipts requested.

51. The Court therefore finds that the defendant did not file income tax returns for any of the years charged.

52. Finally, the Court finds that the defendant committed the charged violations willfully, that is, he

committed a "voluntary, intentional violation of a known legal duty." Cheek v. United States, ___ U.S. ___, 111 S.Ct. 604, 610 (1991); United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973); United States v. Buckley, 586 F.2d 498, 503-504 (5th Cir. 1978), cert. denied, 440 U.S. 982 (1979).

53. The Defendant's legal duty to file tax returns was discussed above, as was his voluntary, purposeful and intentional failure to do so.

54. The only question remaining is whether the defendant's legal duty to file was in fact known by the defendant. The Court finds it was.

55. The defendant says he has studied the Code since 1980. This began after he attending many seminary (sic) on the tax laws that he testified he

initially viewed as "crazy, ridiculous."

56. The defendant testified that their approach to the Internal Revenue Code was "novel and unique." He testified that he then read the Code "cover to cover" once and reread many individual sections many times.

57. The defendant also read many cases, especially U.S. Supreme Court opinions, as well as various Treasury regulations.

58. It is clear that the defendant has done so as he cites and quotes many of these in his correspondences, which are part of the United States' exhibits.

59. The defendant's knowledge of his legal duty to file is best shown by a close examination of Government Exhibit No. 43, which consists of a cover letter from the defendant to Special Agent Mike Lamberth with attached correspondence.

60. In a letter sent by certified mail to the Commissioner of Internal Revenue, dated April 2, 1984, two weeks before his 1983 tax return was due, the defendant asks "do wages and salaries, earned by private individuals working for private companies, constitute taxable 'income' under the 16th amendment to the U.S. Constitution and applicable tax laws?

61. In a letter sent by certified mail to the Commissioner of Internal Revenue, dated May 5, 1094 (sic), the defendant asks: "Who/what is subject to the Internal Revenue Code: Does this Code apply to natural individuals as well as corporations? If so, what determines which natural individuals are subject to the Code?"

62. In a letter sent by certified mail to the Commissioner of Internal

Revenue, dated May 7, 1984, the defendant analyzes Sections 5001 (sic) and 6011 of the Code, and again, asks "how it is determined which persons are liable for this tax."

63. In a letter sent by certified mail to the Commissioner of Internal Revenue, dated May 10, 1984, the defendant expresses concern that providing information on a tax return will violate his "rights protected by the first, fourth, fifth and thirteenth amendments to the Constitution."

64. By a letter, dated June 6, 1984, the Internal Revenue Services (sic) responded to the defendant's April 2 and May 10 letters. The letter states in part:

> Gross income, not "income" is the starting point for determining an individual's federal income tax liability. The term "gross income" is defined in Code section 61 (copy enclosed).

A copy of Section 61 was attached to this letter.

65. The letter clearly stated that wages, salaries and compensation for services are included in gross income.

66. It is significant that on defendant's Exhibit No. 39, the tape recording, the defendant told the special agents that he "choose(s)" not to call the payments he received from ERA for his services "compensation."

67. The Court finds that this is significant because it shows that the defendant knew that the consequences of calling it compensation would bring him squarely within the provisions of Section 61(a)(1) in an amount that under Section 6012 would require him to file tax returns.

68. The letter also contained an attachment that discusses among other things why and how the filing of tax

returns do (sic) not amount to a violation of Constitutional protections.

69. By another letter dated June 18, 1984, the Internal Revenue Service responded to the defendant's May 5 and 7 letters. This letter states in part:

> Sections 6001 and 6011 of the Code provide that a return is to be filed by every person liable for any tax imposed by the Code. . . . In addition, Section 6012 of the Code provides that a federal income tax return must be filed by "every individual" whose gross income for the tax year exceeds certain amounts. . . . Therefore, "natural individuals" are not exempt from the filing requirements or from paying tax.

70. This letter also contained an attachment, which is a copy of the first page of general instructions that accompany a tax return packet.

71. The attachment sets forth filing requirements and states that "(t)hese rules apply to all U.S. citizens. . . ."

72. The defendant in a subsequent letter dismisses this attachment as being self-serving and not being the law.

73. It is clear from his later correspondence contained in Government's Exhibit No. 43, as well as in other exhibits that were admitted into evidence, that the defendant has read these letters and their attachments but disagrees with what they say.

74. The defendant insists that his interpretation that he is not one "liable for the tax" is correct, and the position stated by the IRS in incorrect.

75. While the defendant "has a profound disagreement with the Internal Revenue Service over the proper interpretation of the Internal Revenue Code" (Defendant's Written Argument at 1), his mere disagreement with the law is insufficient to negate the element of willfulness, which the Court finds the

United States has proven beyond a reasonable doubt. Cheek, supra.

76. Thus, the Court finds that the defendant was well aware he had a legal duty to file tax returns, and that he willfully chose not to do so.

77. The defendant also argued that the IRS' tax return forms do not comply with the Paperwork Reduction Act and that, therefore, he was not required to file income tax returns for the years in question.

78. This issue was considered and rejected in U.S. v. Wunder, 919 F.2d 34, 38 (6th Cir. 1990), and again by the Fifth Circuit Court of Appeals in United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991), which held that the Paperwork Reduction Act does not apply to the statutory requirements that a taxpayer must file a return.

79. In view of the foregoing, and as stated in the Order of the Court filed on December 12, 1991, the undersigned finds the defendant guilty on all counts- that is, Counts One, Two, Three and Four contained in Criminal No. A-89-CR-122.

SIGNED and ENTERED this 24th day of March, 1992, at Austin, Texas.

Stephen H. Capelle /s/
STEPHEN H. CAPELLE
UNITED STATES MAGISTRATE JUDGE